

**THANIMALAI & THE GOVERNMENT
OF MALAYSIA v. LEE NGO YEW****[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo)
and Raja Azlan Shah F.J.) December 5, 1974]****[Ipoh — Federal Court Civil Appeal No. 140 of 1973]***Practice and Procedure — Suit against Government — Whether can be brought in Magistrate's Court — Government Proceedings Ordinance, 1956, ss. 17(1) and 41(1) — Subordinate Courts Act, 1948, s. 90.**Interpretation — "May" when to mean "shall" — Repealed legislation — Whether guide to interpretation of subsequent legislation.*

The respondent had sued the appellants in the Magistrate's Court, Ipoh for negligence arising out of a road accident involving the respondent's motor vehicle and the second appellant's motor vehicle driven by the first appellant. The learned magistrate held that he had no jurisdiction to hear the case and dismissed the suit. On appeal, the High Court held that the magistrate was competent to hear the suit but it ordered the case to be heard by the President, Sessions Court, Ipoh. The appellants appealed to the Federal Court.

Held, allowing the appeal: in the light of the Government Proceedings Ordinance, 1956, civil proceedings by or against the Government could only be heard either in the High Court or the Sessions Court and could only be heard in the Magistrate's Court if a special order is made by the Yang Dipertuan Agung. As no such order has been made, the case could not be heard in the Magistrate's Court and it was rightly ordered to be heard by the President, Sessions Court.

Cases referred to:-

- (1) *Alderman Blackwell's case* (1683) 1 Vern. 152; 23 E.R. 381.
- (2) *Rex & Regina v. Barlow* 2 Salkeld 609; 91 E.R. 516.
- (3) *Walker v. Hemmant* [1943] 1 K.B. 604, 605.
- (4) *Blackpool Corporation v. Starr Estate Co.* [1922] 1 A.C. 27 at p. 34.

FEDERAL COURT.

Abdullah bin Ngah (Senior Federal Counsel) for the appellants.

Joga Singh for the respondent.

Suffian L.P.: There are two judgments in this appeal, one by the learned Chief Justice of Borneo and the other by Raja Tan Sri Azlan Shah F.J. In their absence I shall read the one by the learned Chief Justice first and then the other one.

Lee Hun Hoe C.J. (Borneo) (read by **Suffian L.P.**): As a result of an accident on 4th May, 1971 near Perak Caves, Batu 4½, Kampong Tawas between respondent's motor vehicle No. BAA 2503 and second appellant's motor vehicle No. AC 8967 driven by first appellant the former sued the appellants in the Magistrate's Court, Ipoh, for negligence in the sum of \$509 for damages and interest. A preliminary objection was taken that the Magistrate's Court had no jurisdiction in the light of the Government Proceedings Ordinance, 1956. Consequently, the claim was dismissed with costs and respondent was given liberty to file fresh action in the appropriate court. The learned judge allowed the appeal and held that the Magistrate was competent to hear the suit but made an order for the case to be heard by the President, Sessions Court, Ipoh. Appellants appealed to this court.

Originally, there were two grounds of appeal. However, at the hearing appellants abandoned one ground. Therefore, the only ground in this appeal is that the learned judge erred in law in holding that the Magistrate's Court has jurisdiction to hear suits in which the Government of Malaysia is a party thereto.

A Under the Courts Ordinance, 1948 the civil jurisdiction of a First Class Magistrate was limited to one thousand dollars only. This Ordinance was revised and retitled as the Subordinate Courts Act, 1948 and came into force on 1st November, 1972. Section 90 enhances the jurisdiction of a First Class Magistrate and reads:—

B "Subject to the limitations contained in the Act, a First Class Magistrate shall have jurisdiction to try all actions and suits of a civil nature where the amount in dispute or value of the subject matter does not exceed two thousand dollars."

The writ was dated 11th April, 1972 and the defence 21st June, 1972. It seems clear that when the suit was filed the Courts Ordinance, 1948 was still in force. The claim is over \$500. So, in the ordinary way it would be within the jurisdiction of the Magistrate's Court.

C Before 1876 it would seem that an aggrieved subject could only sue the Crown by way of petition of right. Gradually, proceedings by or against the Crown were put on a proper footing first in the former Straits Settlements with the promulgation of the Crown Suits Ordinance XV of 1876. This was followed by other legislation on the same lines including the Government Suits Enactment (F.M.S. Cap. 17). The present law relating to civil proceedings by or against the Government is to be found in the Government Proceedings Ordinance, 1956 which amended, consolidated and replaced various earlier legislation on such matters. It came into force on 1st April, 1958 vide L.N. 107 of 1958.

E The liability of the Government for actionable tort is thus created by statute. Section 5 of the 1956 Ordinance prescribing liability in tort reads:—

F "... Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person is liable for any wrongful act done, or any neglect or default committed by his agent...".

Section 16 of the 1956 Ordinance is concerned with civil proceedings in the High Court. The controversy really centres round sections 17 and 41 which deal with the civil proceedings in the Sessions Court and the special order which the Yang Dipertuan Agung may make respectively. They read as follows:—

G "17(1) Subject to the provision of this Ordinance, and of any written law limiting the jurisdiction of a Sessions Court (whether by reference to the subject matter of the proceedings to be brought or the amount sought to be recovered in the proceedings or otherwise) any proceedings against the Government may be instituted in a Sessions Court.

H (2) Any proceedings by or against the Government in a Sessions Court shall be instituted and proceeded with in accordance with the provisions of this Ordinance and not otherwise."

"41(1) The Yang Dipertuan Agung may by order make such provision as appears to him to be expedient with respect to civil proceedings by or against the Government in any court not being the High Court or a Sessions Court.

I (2) An order made under this section may in particular—
(a) define the jurisdiction of the court to which the order relates in civil proceedings by or against the Government; and

(b) apply, in relation to civil proceedings by or against the Government in the said court, any provisions of this Ordinance which would not otherwise apply in relation to those proceedings with such additions, exceptions and modifications as appear to the Yang Dipertuan Agung to be expedient."

The contention of the appellants is that the provisions of sections 16, 17 and 41 show clearly that proceedings by or against the Government could only be instituted and proceeded with in either the High Court or Sessions Court but that it could also be instituted in the Magistrate's Court if the Yang Dipertuan Agung makes a special order conferring jurisdiction on that court. No such order has been made.

The learned judge stated that section 17 did not prohibit the filing of an action in the Magistrate's Court because the word "may" is used in the section and not "shall". Appellants contended that the learned judge was wrong because on the proper construction of the word "may" in the section should be construed as "shall". The question whether the legislature intends a particular provision to be mandatory or directory must in each case depend upon the scope and object of the particular statute or enactment. Further, we would have to look at the general scheme of the statute or enactment and its express provisions. Sometimes, the word "may" in a statute or enactment is given an imperative meaning. Thus, in *Alderman Backwell's case*⁽¹⁾ the words in an Act of Parliament that the Chancellor may grant a Commission has been held to convey the imperative meaning of must. Wherever a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as "shall". Thus, where a statute says that the sheriff "may" take bail, it is construed to mean "shall" for he is compellable to do so. *Rex & Regina v. Barlow*.⁽²⁾ Having regard to the general scheme of the Government Proceedings Ordinance, 1956, it is quite clear that a duty is cast upon the Sessions Court so that on a proper construction the word "may" in section 17 must be construed to mean "shall".

Reading together particularly sections 16, 17 and 41 of the 1956 Ordinance, it seems the intention of the legislature is clear. That is, proceedings by or against the Government can only be instituted and proceeded in either the High Court or Sessions Court "in accordance with the provisions of this Ordinance and not otherwise." Stress is made on the words italicized. However, proceedings by or against Government can also be instituted or proceeded in any other court if the Yang Dipertuan Agung makes a special order under section 41 conferring jurisdiction on that court if it appears to him to be expedient to do so. Since no such special order has been made proceedings by or against the Government can only be brought in either the High Court or Sessions Court.

Section 27(2) gives the Government the right in the public interest at any stage in a civil proceedings in a subordinate court to apply for removal of the action to the High Court in Kuala Lumpur or such other place on the production of certificate of the Attorney-General. Section 28 deals with the removal or transfer of proceedings from the subordinate court to the High Court or *vice versa*. Because of these provisions and the definition of the subordinate court under section 2 of the 1956 Ordinance to mean a Sessions Court and any Magistrate's Court, the learned judge considered that a magistrate did not lack jurisdiction to entertain such an action but that such jurisdiction could be ousted or displaced on the application of the Government. For myself, I think the learned judge

A was wrong. The question of removal or transfer of proceedings from one court to another does not affect jurisdiction. The learned judge must have in mind section 90 of the Subordinate Courts Act, 1948. It is not disputed that under the section the Magistrate's Court has jurisdiction in cases involving private persons. The Government is placed in a special position. That is why in the early days before the liability of the Government has been created by statute an aggrieved subject would have to make use of the cumbersome process of petition of right. Thus, in proceedings by or against Government one must look at the Government Proceedings Ordinance, 1956 which deals specifically with such matters. If no special order has been made under section 41, as in this case, then a magistrate, even if he has jurisdiction under section 90 of the Subordinate Courts Act, 1948, is not competent to hear proceedings by or against the Government.

The definition of subordinate courts under section 2 of the 1956 Ordinance clearly envisages the possibility of a special order or orders being made under section 41. Therefore, if such special order or orders have been made, then all the provisions of the Ordinance with reference to subordinate courts will fall into proper perspective.

The learned judge referred to section 109 of the Subordinate Courts Act, 1948 and said that it fortified his view that the Magistrate's Court has jurisdiction to hear the claim. This section reads:—

"In the event of inconsistency or conflict between this Act and any other written law in force at the commencement of this Act, the provisions of this Act shall prevail."

The words italicized are important. The Subordinate Courts Act, 1948 is merely a new title given to the Courts Ordinance, 1948 after certain revision. The Courts Ordinance, 1948 came into force on 1st January, 1949 long before the Government Proceedings Ordinance, 1956 was enacted. So that at the commencement of the Courts Ordinance, 1948 the 1956 Ordinance was not in existence. Further, the 1956 Ordinance is a special legislation laying down the appropriate courts whereby proceedings by or against the Government should be instituted. It fixes the forum but does not question the jurisdiction of the various courts. The question of inconsistency or conflict, therefore, did not arise. Section 109 should not have been invoked at all.

The learned judge stated the relevant legislation defining jurisdiction of the courts at the time the 1956 Ordinance was enacted was the Courts Ordinance, 1948. He went on to express the view that at that time because of the dearth of qualified magistrates and the complex nature of proceedings involving the Government as a party the legislature thought it right for such suits to be tried either in the High Court or Sessions Court. It is probable that the complex nature of such proceedings rather than the quality or standard of magistrates which compelled the legislature to provide for proceedings by or against the Government to be heard either in the High Court or Sessions Court. This is because even today there are magistrates without professional qualifications sitting in courts and they are doing a fine job. If at that time even though the

Magistrate's Court had jurisdiction under the Courts Ordinance, 1948 but could not deal with proceedings in which Government was a party the situation would still be the same even with the coming into force of the Subordinate Courts Act, 1948. Such suit would still have to be heard either in the High Court or Sessions Court.

Appellants referred to the maxim *generalia specialibus non derogant* and cited *Walker v. Hemmatt*⁽³⁾ to support their contention that a statute (Subordinate Courts Act, 1948) dealing with a general subject could not override a statute (Government Proceedings Ordinance, 1956) dealing with a special subject. In other words, a general law could not override a special law. I think appellants overlook the fact that the 1956 Ordinance is in fact a later statute.

In *Blackpool Corporation v. Starr Estate Co.*⁽⁴⁾ Lord Haldane L.C. stated the principle to be applied in construing the general language of a statute in this passage:—

"It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually unless an intention to do so is specially declared."

I rest my judgment upon the specific limitation in the language of the Government Proceedings Ordinance, 1956, particularly section 41 which clearly indicates that civil proceedings by or against the Government could only be heard either in the High Court or Sessions Court but that such proceedings could also be heard in the Magistrate's Court if the Yang Di-pertuan Agung makes a special order. In view of the reference to subordinate courts and the definitions given to it by section 2 of the 1956 Ordinance, the words "any court" in section 41 could only refer to Magistrate's Court.

I do not think the legislature intended to oust the jurisdiction of the Magistrate's Court when promulgating the 1956 Ordinance. The intention of the legislature was merely to provide the forum for proceedings by or against the Government. In other words, the 1956 Ordinance restricts the hearing of such proceedings to either the High Court or Sessions Court while reserving certain power to the Yang Di-pertuan Agung to permit a Magistrate's Court to hear such proceedings only by a special order to be made by him. Since no such order has been made, consequently such proceedings could only be heard in either the High Court or Sessions Court. Therefore, the learned magistrate was right to say that he had no jurisdiction to hear such claims by reason of the Government Proceedings Ordinance, 1956 and the learned judge was wrong to overrule him on this point.

For reasons given, I would allow the appeal to the extent that the learned judge was wrong to say that the suit was within the competence of the Magistrate's Court. I would, however, affirm the order that the suit be heard by the President of the Sessions Court, Ipoh. As to costs, I think the proper order is that they are to abide the result of the action.

Raja Azlan Shah F.J. (read by **Suffian L.P.**): Before April 1958 a Magistrate's Court may (or may not)

have jurisdiction with regard to civil proceedings against the Government by virtue of F.M.S. (Cap. 17) read with section 90 of the Courts Ordinance, 1948. The question now is whether a subsequent legislation which by express words confers jurisdiction on Sessions Courts and the High Court with regard to government proceedings, deprived the Magistrates' Courts of jurisdiction it had previously exercised. The general rule undoubtedly is that where jurisdiction is conferred on a court by law, the legislature has power to exclude jurisdiction only by express words or necessary implication.

Section 16 of the Government Proceedings Ordinance, 1956 enacts *inter alia*—

"civil proceedings by or against the Government as are provided by any statutory provision *repealed* (emphasis is mine) by this Ordinance are hereby abolished...."

F.M.S. (Cap. 17) is now repealed by the Government Proceedings Ordinance, 1956. Therefore the contents of the earlier Code affords no reliable guide to the interpretation of the subsequent legislation. For all practical purposes the earlier code is "dead". It may be noted that it is an express repeal by a subsequent law and *NOT* a repeal by implication.

It would seem to be clear that the intention of section 17 of the Ordinance is to exclude magistrate's jurisdiction.

Section 41(1) of the Ordinance gives power to the High Commissioner in Council (now The Yang Di-pertuan Agung) to make any order—

"as appears to him to be expedient with respect to civil proceedings by or against the Government in any court not being the High Court or a Sessions Court."

It may be observed that no similar provision was made in the old F.M.S. (Cap. 17). Now the object of the legislature and its intent, meaning and spirit can only be ascertained from the terms of the act itself, meaning thus the Government Proceedings Ordinance, 1956. It is my view that the wording of section 17 read with section 41(1) do not contain any ambiguity. They say what they have to say, simply that the Sessions and the High Courts have jurisdiction with regard to Government proceedings. And where the controversial matter is altogether omitted from the Ordinance, it is clearly not allowable to insert it by implication, for to do so would not be to construe the Ordinance but to alter it.

I would allow the appeal.

Suffian L.P.: I agree with the above two judgments that this appeal be allowed with costs for the reasons given.

Accordingly the order of the court is that this appeal is allowed to the extent that the learned appellate judge was wrong in holding that the learned magistrate had jurisdiction to try this suit. We would however affirm the order of the learned appellate judge that this suit be heard by the President of the Sessions Court, Ipoh, and that costs should abide the result of the action.

Costs of this appeal should also abide the result of the action.

Appeal allowed.

Solicitors: *Richard Talalla & Co.*